Tapah bin Bangkol v Superintendant of Lands and Surveys

HIGH COURT (LIMBANG) — ORIGINATING MOTION NO 25-04 OF 1998 (LG)
HASAN JC
15 JULY 1999

Land Law *— Customary land — Right to — Application for mandamus to order issue of settlement notification to determine native customary rights of applicant over land — Applicant requested to evict land — Allegation of occupation of land since 1958 — Proper party to be cited, whether Director and not Superintendant of Lands and Surveys — Whether applicant has specific legal right to enforce public duty against Superintendant of Lands and Surveys — Whether discretion to evict exercised of Director was exercised wrongfully — Land Code (Sarawak Cap 81) s 84*

The applicant was staying in his own house built on a parcel of land situated in Limbang ('the land'). The respondent sent letters to the applicant demanding that the applicant demolish the house and move out from the land. The applicant contended that he had native customary rights over the land as, before 1962, his parents made their living on the products of the land and on fishing by the many streams in Ranggau and he was very active in the gathering of 'bakau' trees for his family's income. The applicant further stated that in 1963, he and his family settled down at his wife's village of Kampong Seberang Kedai, Limbang and on 10 May 1974, he received a letter from the Ministry of Forest, Sarawak permitting him to extract 'bakau' trees in Kampong Ranggau. In 1995, he moved back to Kampong Ranggau and built his own house on the land which he claimed formerly belonged to his parents.

The applicant, by way of an originating motion, applied for an order of mandamus against the respondent to move the respondent to issue a settlement notification pursuant to s 84 of Land Code (Sarawak Cap 81) ('the Code') to determine the native customary rights of the applicant over the land. The applicant contended that the respondent's conduct, in trying to demolish his house and evicting his family out of the land without giving him a chance to defend himself as required by the Code, is contrary to statutory provisions and natural justice. The applicant claimed that the land is within the category of 'Native Customary Land' as defined under s 2 of the Code as the applicant's grandparents and parents had occupied and cultivated the land prior to 1 January 1958 as required by s 5 of the Code. The respondent argued, inter alia, that: (i) the proper party to be cited in this action is the Director and not the Superintendant of Lands and Surveys Fifth Division, Sarawak; (ii) the applicant had no specific legal right to enforce a public duty against the respondent; and (iii) there is no reason to suggest that the discretion exercised of the Director was exercised wrongfully, unfairly, dishonestly or in bad faith.

Held, dismissing the application:

(1) Section 84(1) of the Code mentions the word 'Director' and, as such, the proper party to be cited in this action is the Director and not the Superintendant of Lands and Surveys Fifth Division, Sarawak (see p 593G).

(2) There was no evidence to support the applicant's claim that the land was a native customary land other than a bare assertion made by him. In fact, the applicant had not disputed the respondent's assertion that the applicant's house is about 470 meters away from Kampong Rangau as shown in the Survey Job No 48/98.

From the documentary evidence, it shows that the area claimed by the applicant was covered by mangrove trees or swamp and nobody occupied the area in 1948, 1964, 1977 and 1980. As such, there was no merit in the applicant's contention that the land had been occupied by him and his predecessors prior to 1 January 1958. The applicant had no legal right to require the respondent to publish a settlement notification (see p 595D–G).

(3) The Director may issue the settlement notification only if it appears likely to him that the applicant had acquired native customary rights over the land. In his letter dated 28 May 1998, the respondent had informed the applicant that after an investigation was carried out, they found that the land is not a native customary land. The finding was justified in view of the documentary evidence available as adduced by the respondent in his affidavit. There is no reason or evidence to suggest that the discretion was exercised by the Director wrongfully, unfairly, dishonestly or in bad faith (see p 597D–F).

[Bahasa Malaysia summary

Pemohon telah menetap di rumah beliau sendiri yang dibina di atas sebidang tanah di Limbang ('tanah tersebut'). Penentang telah menghantar beberapa pucuk surat kepada pemohon mendesak pemohon merobohkan rumah tersebut dan keluar daripada tanah tersebut. Pemohon menegaskan bahawa beliau mempunyai hak adat anak watan ke atas tanah tersebut kerana, sebelum tahun 1962, ibubapa beliau telah menyara hidup atas hasil tanah tersebut dan atas penangkapan ikan di tepi kebanyakan sungai-sungai di Ranggau dan beliau amat giat di dalam mengumpul pokok-pokok bakau untuk pendapatan keluarga beliau. Pemohon seterusnya menyatakan bahawa di dalam tahun 1963, beliau dan keluarga beliau telah menetap di perkampungan isteri beliau di Kampong Seberang Kedai, Limbang dan pada 10 Mei 1974, beliau telah menerima sepucuk surat daripada Kementerian Perhutanan, Sarawak membenarkan beliau memetik pokok-pokok bakau di Kampong Ranggau. Pada tahun 1995, beliau berpindah semula ke Kampong Ranggau dan membina rumah beliau sendiri di atas tanah tersebut yang mana beliau mendakwa adalah kepunyaan ibu bapa beliau.

Pemohon, melalui saman pemula, memohon untuk suatu perintah mandamus terhadap penentang untuk memohon penentang mengeluarkan suatu pemberitauan penempatan menurut s 84 Kanun Tanah (Sarawak Bab 81) ('Kanun tersebut') untuk menentukan hak adat anak watan pemohon ke atas tanah tersebut. Pemohon menegaskan bahawa perbuatan penentang di dalam mencuba untuk merobohkan rumah beliau dan menghalau keluar keluarga beliau daripada tanah tersebut tanpa memberi peluang kepada beliau untuk membela diri sebagaimana diperuntukkan oleh Kanun tersebut, adalah bertentangan dengan peruntukan statutori dan kategori 'Tanah Adat Anak Watan' sepertimana yang ditafsirkan di bawah s 2 Kanun tersebut. Penetang menghujahkan, antara lain, bahawa: (i) pihak yang betul yang perlu dinamakan di dalam tindakan ini adalah Pengarah dan bukan Penguasa Tanah dan Kerja Ukur Bahagian Kelima, Sarawak; (ii) pemohon tidak mempunyai apa-apa hak yang khusus di sisi undang-undang untuk menguatkuasakan tanggungjawab awam terhadap penentang; dan (iii) tidak ada sebab untuk mencadangkan bahawa budi bicara yang dilaksanakan oleh Pengarah tersebut adalah dilaksanakan secara salah, tidak adil, tidak jujur atau berniat jahat.

Diputuskan, menolak permohonan tersebut:

(1) Seksyen 84(1) Kanun tersebut menyebut perkataan 'Pengarah' dan, oleh demikian, pihak yang betul untuk dinamakan di dalam tindakan ini ialah Pengarah tersebut dan bukan Penguasa Tanah dan Kerja Ukur Bahagian Kelima, Sarawak (lihat ms 593G).

(2) Tiada bukti yang menyokong tuntutan pemohon bahawa tanah tersebut merupakan tanah adat anak watan selain daripada kenyataan asas yang dibuat oleh beliau. Juga, pemohon tidak mempertikaikan kenyataan penentang bahawa rumah pemohon adalah sejauh 470 meter daripada Kampong Ranggau seperti mana yang ditunjukkan di dalam Kerja Ukur No 48/98.

Daripada bukti dokumentasi, adalah ditunjukkan bahawa kawasan yang dituntut oleh pemohon diliputi pokok-pokok bakau dan paya dan tiada penduduk yang menetap di kawasan tersebut di dalam tahun-tahun 1948, 1964, 1977 dan 1980. Oleh itu, tidak ada merit di dalam perdebatan pemohon bahawa tanah tersebut telah diduduki oleh beliau dan orang yang terdahulu daripada beliau sebelum 1 Januari 1958. Pemohon tidak ada hak di sisi undang-undang untuk menghendaki penentang mengumumkan suatu pemberitahuan penempatan (lihat ms 595D–G).

(3) Pengarah boleh mengeluarkan pemberitahuan penempatan tersebut hanya jika beliau memikirkan kemungkinan penentang telah memperoleh hak-hak adat anak watan ke atas tanah tersebut. Di dalam surat beliau bertarikh 28 Mei 1998, penentang telah memberitahu pemohon bahawa selepas suatu siasatan dijalankan, mereka mendapati bahawa tanah tersebut bukanlah tanah adat anak watan. Penemuan ini mempunyai alasan yang kuat berdasarkan bukti dokumentasi yang ada seperti mana yang

dikemukakan oleh penentang di dalam afidavit beliau. Tidak ada sebab atau bukti yang mencadangkan bahawa budi bicara yang dilaksanakan oleh Pengarah tersebut adalah salah, tidak adil, tidak jujur atau berniat jahat (lihat ms 597D–F).]

Cases referred to

Baldwin & Francis Ltd v Patents Appeal Tribunal & Ors [1959] AC 663 (refd)

Fletcher's Application, Re [1970] 2 All ER 527 (refd)

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180 (refd)

Mansor bin Mat Tahir v Kadi Daerah Pendang Kedah & Anor [1989] 1 MLJ 106 (refd)

Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (refd)

Persatuan Aliran Kesedaran Negara v Minister of Home Affairs [1988] 1 MLJ 440 (refd)

Legislation referred to

Sarawak Land Code (Cap 81) ss 2, 3, 5, (2), 84(1)

Nelson Ruki (*Daud Ismail & Co*) for the plaintiff.
Thomas Akin Jelimin (State Attorney General) for the defendant.

Cur Adv Vult

Hasan JC: In this originating motion, the applicant had applied for an order of mandamus be made against the respondent to move the respondent to issue a Settlement Notification pursuant to s 84 of Land Code (Sarawak Cap 81) ('the Code') to determine the native customary rights of the applicant over a parcel of land situated at Kampong Ranggau, Limbang, Sarawak containing an area of ten acres more or less together with a single-storey wooden house built thereon and costs of this application. This application was supported by the applicant's affidavit which was affirmed on 29 July 1998.

The application was opposed by the respondent and the respondent had filed an affidavit in opposition affirmed by Valentine Liaw Aik Sin on 25 November 1998.

The facts of the case can be summarized as follows. At the relevant time, the applicant was staying in his own house built on a parcel of land situated in Limbang containing an area of 10 acres more or less ('the said land'). On 2 May 1997, the respondent sent a letter to the applicant demanding that the applicant demolish the house and move out from the said land. Subsequently the respondent issued two more similar letters.

On 27 June 1997, the applicant, through his solicitors, wrote to the respondent notifying the respondent that the applicant has native customary rights over the said land and requested for his claim to be heard by the respondent. On 12 May 1998, the applicant again wrote a similar letter to the respondent. On 28 May 1998, the respondent informed the applicant that investigations had been carried out and that they were

satisfied that the applicant's native customary rights did not exist on the said land.

On 4 June 1998, the applicant wrote to the respondent claiming that the investigations upon the said land was not properly conducted as required under the Code and the applicant was never called to present his claim. Another letter was sent to the respondent on 24 June 1998 requesting the respondent to answer several questions pertaining to the status of the said land.

Case for the applicant

The applicant contended that the said land is situated in Kampong Ranggau, Limbang and that he had a native customary rights over the said land. According to the applicant, Kampong Ranggau existed since 1912. Before the year 1963, there were about 70 houses in the said Kampong Ranggau, with a total population of about 1,200 people. As a result of a big confrontation between the people of Ranggau and the British 1962 the people of Kampong Ranggau including himself were forced out of their land in 1963 and they had to settle down in other nearby villages or in Brunei. The houses and buildings left behind were either destroyed or are now worn down by the force of time.

The applicant also stated that he was born on 4 December 1939 on the said land. Before 1962 his parents made their living on the products of the said land and on fishing by the many streams in Ranggau and he was very active in the gathering of 'bakau' trees for his family's income.

The applicant further stated that in 1963 he and his families settled down at his wife's village of Kampong Seberang Kedai, Limbang. He wrote to the Chief Minister of Sarawak and the Forest Department, Miri requesting for a permit to cut 'bakau' trees in Kampong Ranggau. On 10 May 1974, he received a letter from the Ministry of Forest, Sarawak permitting him to extract 'bakau' trees in Kampong Ranggau. In 1995, he moved back to Kampong Ranggau and built his own house on the said land which he claimed formerly belonged to his parents.

The applicant contended that the act of the respondent in trying to demolish his house and evicting his family out of the said land without giving him a chance to defend himself as required by the Code is contrary to statutory provisions and natural justice. He further contended that the said land could not be acquired by the respondent without first investigating the claimants of native customary rights as required under s 84 of the Sarawak Land Code.

Case for the respondent

The respondent contended that the respondent was not a proper party in this action and that even if the respondent was the right party to the action an order of mandamus is not the proper remedy in this case.

The respondent asserted that the applicant had occupied the said land which is a state land unlawfully after August 1996 which was after an announcement was made that the new Limbang airport and new low cost housing scheme would be sited at Rangau area. According to the

A respondent, nobody occupied the said land in 1948, 1964, 1977 and 1980 because it was covered by mangrove swamp forest as shown by the airphotos. The defendant also alleged that the distant from the applicant's house to Kampong Rangau is about 470 meters as shown in the Survey Job No 48/98. Hence the respondent denied that the applicant had any customary rights in the said land. According to the respondent, the facts
B and circumstances of the applicant's case did not give rise to the situation envisaged under s 84 of the Code.

Findings of the court

It was the contention of the respondent that the power to issue the
C settlement notification under s 84 of the Code is given to the Director of Lands and Surveys but it does not extend the power to the respondent who was only a superintendant. On the other hand the learned counsel for the applicant contended that the respondent was the correct party based on the definition of the word 'Director' in s 2 and the provision of s 3 of the Code.

D For ease of reference, I reproduce the provision of s 84 of the Code. It states:

> (1) Whenever it appears to the Director that in any area there may be doubt or uncertainty as to whether the existing documents of title properly define the rights and interests of those entitled or the boundaries of the land included therein, or where it appears likely that rights of ownership
> E have been acquired by natives by the exercise of their customary rights, or whenever for any other reason he is of the opinion that it is expedient to effect a settlement of rights, he may publish in the Gazette a Settlement Notification in accordance with the provisions of sub-s (2).
>
> (2) The Settlement Notification shall state the situation of limits of the area, hereinafter called 'the settlement area', within which the settlement of
> F rights to land and registration thereof shall be effected and shall declare that after a period to be defined in the Settlement Notification, the demarcation of parcels and presentation of claims may begin in any block within the settlement area.
>
> (3) On or after the publication of the Settlement Notification under this section, the Director shall assign a Settlement Officer and such Assistant
> G Settlement Officers as may be necessary to carry out the settlement.

The said s 84(1) mentions the word 'Director' and as such I agreed with the respondent that the proper party to be cited in this action was the Director and not the superintendant of Lands and Surveys Fifth Division, Sarawak.

As regards the merits of the application, the learned Senior State Legal
H Officer submitted that:

(a) Mandamus should not be issued by court because there is an alternative remedy available;

(b) The applicant had no specific legal right to enforce a public duty against the respondent; and

I (c) The power given under s 84 of the Code is discretionary.

With regard to the issue of alternative remedy, it was submitted by the respondent that the applicant could have applied for a declaration in respect

of his claim over the said land because the applicant's right over the said land had not been determined yet. In this connection, the issue for determination is whether declaration is an equally beneficial effective and convenient remedy (see *Baldwin & Francis Ltd v Patents Appeal Tribunal & Ors* [1959] AC 663). In this respect, the learned author in *Administrative Law of Malaysia and Singapore* (2nd Ed) by MP Jain had made the following comment at p 497:

> A declaration merely declares what the legal rights of the concerned parties are. A declaratory order has no coercive force as such nor does it quash any decision which may have been taken by an administrative authority.

In this action, the applicant had applied for an order of the court to direct the respondent to issue a settlement notification pursuant to s 84 of the Code to determine the applicant's claim over the said land. It is my view that a declaration would not be effective, beneficial and convenient to the applicant under the circumstances as it does not have a coercive force to ensure that the respondent would comply with the declaration, if it was granted by the court. As such, I am unable to agree with the respondent that the applicant had an alternative remedy which was equally beneficial, effective and convenient in the form of declaration.

The next issue is whether the applicant had a specific legal right to enforce a public duty against the respondent. It was submitted by the learned counsel for the respondent that the applicant had no specific right on his claim because the claim had not been recognized by the respondent yet. It was further submitted that the applicant had no standing to bring the action as the right claimed is doubtful. In support of that, the learned counsel cited the case of *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180.

In *Koon Hoi Chow*'s case the applicant made an application under s 44 of the Specific Relief Ordinance 1950 for an order of mandamus against the respondent, the surgeon who performed the operation on an infant. The applicant made the application after the respondent refused to supply the information on the injuries found on the infant and the treatment given by the hospital. The application was dismissed by Sharma J on the ground that the applicant had failed to show the existence of any legal right to compel the performance of a legal duty cast upon the respondent. At p 182, the learned judge had made the following observation:

> ... The applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent.

In the present case, the applicant claimed that the said land is within the category of 'Native Customary Land' as defined under s 2 of the Code. According to the applicant his grandparents and parents had occupied and cultivated the said land prior to 1 January 1958 as required by s 5 of the Code. He was born on the said land and had earned his living on the product of the said land.

In a letter dated 28 May 1998, ie exh TB-8 to the applicant's affidavit the respondent informed the counsel for the applicant that the investigation

had been carried out by the Department of Land and Survey, Limbang over the applicant's claim to the said land and it was found that the applicant had not acquired the customary rights over the said land.

Under s 2 of the Code Native Customary, land is defined as:

(a) land in which native customary rights, whether commercial or otherwise, have lawfully been created prior to 1 January 1958 and still subsist as such;

(b) land from time to time comprised in a reserve to which s 6 applies; and

(c) Interior Area land upon which native customary rights have been lawfully created pursuant to a permit under s 10.

For the purpose of the present action, para (a) is relevant. Under sub-s (2) to s 5 of the Code, it is provided that the native customary rights may be acquired, inter alia, by the felling of virgin jungle and the occupation of the land thereby cleared, the planting of land with fruit trees and the occupation or cultivation of land.

From the affidavit evidence, there was no doubt that Kampong Ranggau had existed before 1958. However what is important here is whether the applicant had acquired a native customary right over the said land. There was no evidence to support the applicant's claim that the said land was a native customary land other than a bare assertion made by him. In fact the applicant had not disputed the respondent's assertion that the applicant's house is about 470 meters away from Kampong Rangau as shown in the Survey Job No 48/98 (exh VLAS-7 of the respondent's affidavit). In fact, the learned counsel had informed the court that they were not disputing the locality of the applicant's house as shown in exh 'VLAS-7' but the applicant contended that the house was located within Kampong Ranggau.

From the documentary evidence adduced by the respondent which were in the form of the airphotos, the land use map of 1980 and the Survey Job No 48/98 it shows that the area claimed by the applicant was covered by mangrove trees or swamp and nobody occupied the area in 1948, 1964, 1977 and 1980. As such there was no merit in the applicant contention that the said land had been occupied by him and his predecessors prior to 1 January 1958. In the circumstances I am of the opinion that the applicant had no legal right to require the respondent to publish a settlement notification. The evidence as adduced by the respondent did not show that the said land had been occupied prior to 1980.

The final issue deals with the discretionary power of the respondent. The learned counsel for the respondent submitted, if I understood him correctly, that s 84 of the Code provides a discretionary power to the respondent and mandamus cannot be granted against a person exercising his discretionary power. In support of that the counsel cited the following cases:

(a) *Re Fletcher's Application* [1970] 2 All ER 527; and

(b) *Mansor bin Mat Tahir v Kadi Daerah Pendang Kedah & Anor* [1989] 1 MLJ 106.

It was also submitted that based on the evidence available, the respondent's decision of not issuing a settlement notification in respect of the said land was justified. A

In *Mansor bin Mat Tahir*'s case, the applicant had applied for an order of mandamus against the Kadi of Daerah Pendang, Kedah and the Chief Registrar of Marriage, Divorce and Revocation, Kedah to order them to register a marriage. In dismissing the application Mohamed Ariff J had this to say at p 113: B

> Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent, I would only refer to s 23(1) of the Islamic Family Enactment. In particular s 23(1)(a) is to satisfy the registrar that the marriage has been solemnized (a requirement of satisfying would involve discretion). Since it involves discretion, on the strength of *Loh Wai Kong v Government of Malaysia & Ors* [1978] 2 MLJ 175 mandamus should not be granted to the applicant. Apart from that, it also involves a question of judgment on the part of the Registrar of Marriage. Judgment would be in compliance with s 23(1)(a), namely, any evidence oral or written. This is to be read with (b), ie to give any detail as required by the registrar. Because of the words in s 23(1)(a) and (b) judgment comes into the picture and when judgment is involved, 'mandamus should not be given'. C D

The learned counsel for the applicant agreed that the Director is given a discretionary power under the said s 84. However the learned counsel contended that the exercise of the discretion is subject to judicial review. In support of that the learned counsel cited the case of *Persatuan Aliran Kesedaran Negara v Minister of Home Affairs* [1988] 1 MLJ 440. In that case, the applicant had applied for a permit to publish a fortnightly magazine but it was rejected by the Minister. The applicant then instituted the proceedings for orders of certiorari and mandamus to be issued against the Minister. In allowing the application Harun J (as he then was) had made the following observation at p 442: E F

> It is common ground that although the discretion is absolute it is not unfettered. It follows that the exercise of the discretion is subject to judicial review. In the instant case, Aliran has compiled with all the requirements for the permit. There is no evidence that the granting of the permit asked for is against the public interest. G

It is to be noted that the decision of Harun J was reversed by the Supreme Court in *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351 where the Supreme Court had inter alia held that s 12(2) of the Printing Presses and Publications Act 1984 gives the Minister of Home Affairs absolute discretion to refuse an application for a licence on permit. So unless it can be clearly established that the Minister of Home Affairs had in any way exercised his discretion wrongfully, unfairly, dishonestly or in bad faith, the High Court cannot question the discretion of the Minister. H

Therefore it is not quite correct to say that the court is functionless in the area of discretionary powers and that such powers are completely beyond the boundary of judicial review. The authorities show that the court can review a discretionary decision on certain grounds but the decision I

A cannot be reviewed on merits. The grounds for judicial review have been stated by the Supreme Court in *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* that the discretion was exercised wrongfully, unfairly, dishonestly or in bad faith.

Now to revert to the present case before me. Under s 84(1) of the Code, B it is envisaged that the Director may publish a settlement notification under the following circumstances:

(a) Whenever it appears to him that in any area there may be doubt or uncertainty as to whether the existing documents of title properly define the rights and interests of those entitled or the boundaries of land included therein;

C

(b) Where it appears likely that rights of ownership have been acquired by natives by the exercise of their customary right; and

(c) Whenever for any other reason he is of the opinion that it is expedient to effect a settlement of rights.

D For the purpose of the present case, para (b) above is relevant. This means that the Director may issue the settlement notification only if it appears likely to him that the applicant had acquired native customary rights over the said land. In his letter dated 28 May 1998 (exh TB-8 to the applicant's affidavit) the respondent had informed the applicant that after an investigation was carried out they found that the said land was not a native E customary land. In my opinion the finding was justified in view of the documentary evidences available as adduced by the respondent in his affidavit. Therefore on the evidences available to him the respondent was of the view that it did not appear likely to him that rights of ownership had been acquired by the applicant over the said land. As such, there was no reason for him to issue a notification settlement. There is no reason or F evidence to suggest that the discretion was exercised by the Director wrongfully, unfairly, dishonestly or in bad faith. He made the decision based on sufficient evidence. There was no requirement at that stage to call the applicant to present his claim. Such requirement would only arise after the settlement notification had been published. In *Pengarah Tanah Dan* G *Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, Raja Azlan Shah Ag CJ (Malaya) (as he then was) had made the following observation at p 149:

> ... Lastly, it is not the province of the courts to review the decisions of government departments merely on their merits. Government by judges would be regarded as an usurpation.

H

For the reasons adumbrated above, I dismissed the application with costs to be taxed.

Application dismissed.

I Reported by Benjamin Yong